STATE OF MICHIGAN

COURT OF APPEALS

ANNE MARIE McBRIEN and WILLIAM McBRIEN, Plaintiffs-Appellants, v TITAN INSURANCE COMPANY, STEVE KITCHENS and AMANDA KITCHENS, Defendants-Appellees.	UNPUBLISHED June 24, 2003 No. 238045 Oakland Circuit Court LC No. 2000-025731-NF

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this action claiming that defendants are liable for plaintiffs' lack of insurance coverage for an automobile accident. We reverse and remand.

I

This case arises following defendant Titan Insurance Company's denial of plaintiffs' insurance claim related to an automobile accident on the ground that plaintiffs' coverage had lapsed for nonpayment. It is undisputed that in November 1998, plaintiffs secured an automobile insurance policy from defendant Titan Insurance Company through insurance agent defendant Steve Kitchens. The policy provided coverage for six months, through May 4, 1999, at which time the renewal payment was due. It is also undisputed that plaintiffs failed to make the payment when due, and the insurance policy lapsed. However, the parties dispute whether payment was subsequently made at the direction of defendant Amanda Kitchens, who worked at agent Steve Kitchens' Allstate Insurance office,[1] thereby causing plaintiffs to mistakenly believe that their Titan policy was renewed.

[1] According to Steve's deposition testimony, he was an employee of Allstate Insurance at the time, and he and another agent worked at the Allstate Insurance office. It was Steve's understanding that Allstate agents were authorized to do business with Titan Insurance by an agreement between Allstate and Titan Insurance. According to Amanda's deposition testimony, she was employed by a payroll company, Checks and Balances, that Allstate used to supply support staff to its offices. Amanda is Steve's daughter.

According to the deposition testimony of plaintiff William McBrien, he realized in June 1999 that he had not made the renewal payment. He went to agent Kitchens' Allstate office and Amanda Kitchens assisted him. He had a check dated June 25, 1999, made out by his wife, plaintiff Anne Marie McBrien, in the amount of the $414.00, the renewal amount. He asked Amanda how the matter should be handled. Amanda indicated that she would call Titan and subsequently made a telephone call in William's presence. She informed William that the woman at Titan said to send in the payment and the insurance policy would be renewed with a lapse. Amanda then told William to leave the envelope with the premium payment check with her and she would forward it to Titan. William asked about a receipt and Amanda told him that his canceled check would be his receipt and that he would receive something later from Titan.

According to Amanda's deposition testimony, she did not recall William coming into the Allstate office sometime in June and stating that he had forgotten to make his payment and that he wanted to make it. She testified that if an individual came in under those circumstances, where payment was more than thirty days past due, she would not have called Titan because a new application would have to be completed and the payment could be quoted from a computer program. She would then take the payment and mail it directly to Titan. If William had come in and his payment was less than thirty days late, she would call Titan to get the amount due for reinstatement. She would then take the payment, give a receipt, and mail the payment to Titan.

On August 31, 1999, Anne McBrien was involved in a serious automobile accident. Plaintiffs sought coverage under their automobile insurance policy and were informed by Titan that the policy had lapsed, and therefore there was no coverage for the accident. Plaintiffs filed this action in August 2000. Titan maintained that it had no record of any phone calls from the Kitchens' Allstate office on June 25, 1999 and that it never received plaintiffs' check. The check that William allegedly left with Amanda never cleared the bank. The trial court granted defendants' motion for summary disposition.

II

Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants. This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* at 455; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

A

Plaintiffs claim the trial court erred in granting defendants Kitchens' motion for summary disposition on the ground that the Kitchens owed no duty to plaintiffs. We agree.

Plaintiffs filed this action against the Kitchens based on theories of negligence and negligent misrepresentation. The trial court ruled that the Kitchens were entitled to summary disposition because they owed no duty to plaintiffs. Citing *Harts v Farmers Ins Exch*, 461 Mich 1, 8; 597 NW2d 47 (1999), the court observed that under Michigan law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage and that the agent's only job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered. Applying the rules to the present case, the court reasoned that although plaintiffs received a termination notice for their policy, they allowed their insurance policy to lapse, and the Kitchens were under no duty to advise plaintiffs about the lapse in coverage.[2]

While we do not disagree with the general rules of law set forth by the trial court, we find the rules inapposite in the circumstances of this case. Michigan law recognizes a cause of action in tort for an insurance agent's failure to procure requested insurance coverage. *Holton v A+ Ins Associates Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003); *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87; 492 NW2d 460 (1992). This includes an insurance agent's duty to advise an insured upon a showing of a special relationship. *Holton, supra*; *Stein v Continental Cas Co*, 110 Mich App 410, 416; 313 NW2d 299 (1981), mod in part, *Harts, supra* at 10.

In *Holton*, decided after the trial court's decision in this case, this Court recognized that the plaintiffs homeowners had a valid cause of action against their insurance agent in alleging that the agent failed to procure additional insurance coverage that the plaintiffs requested when they remodeled their home, which increased its value. *Holton, supra* at 319, 324-325. Similarly, in this case, plaintiffs' action against the Kitchens is premised on the agent's failure to procure requested insurance. Although the Kitchens dispute that William ever requested the insurance as he asserts, the standard for deciding a motion for summary disposition requires that the court view the evidence in the light most favorable to the nonmoving party, in this case, plaintiffs. *Smith*, supra at 454.

Viewing the pleadings, depositions, and documentary evidence in the light most favorable to plaintiffs, we conclude that the grant of summary disposition was improper. According to William's deposition, Amanda called Titan and received instructions for reinstating plaintiffs' insurance coverage. She informed William that the woman at Titan said to send in the payment and the insurance policy would be renewed with a lapse, which he understood to mean a lapse from May 4, 1999 to the date of the phone call. Amanda then told William to leave the envelope with the premium payment check with her and she would forward it to Titan. William gave the check to Amanda. Further, plaintiffs proffered the carbon copy of the check as

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[2] In an action for negligence, a defendant may not be held liable where there is not a prima facie showing of (1) a duty, (2) breach of that duty, (3) causation, and (4) damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

documentary evidence of these facts. The carbon copy of the check, no. 3456, dated June 25, 1999, in the amount of $414.00 was made payable to Titan Insurance Co. The memo line has a notation "01-PA000935462," which is the policy number of the automobile policy previously issued by Titan to plaintiffs. This evidence is sufficient to create a genuine issue of material fact regarding whether the Kitchens were negligent in procuring insurance coverage for plaintiffs, and thus summary disposition was improper.

Although Amanda stated in her deposition that she did not recall this incident, and there was no record of the check being processed by the Allstate office, no evidence directly negated William's account such that it could be completely discounted as a matter of law. A court is not permitted to assess credibility or determine facts on a motion for summary disposition.[3] *Skinner v Square D Co,* 445 Mich 153, 161; 516 NW2d 475 (1994).

B

Plaintiffs argue that the trial court erred in granting the motion of Titan for summary disposition on the ground that estoppel did not apply because plaintiffs' reliance had not been reasonable. We agree.

Plaintiffs alleged in their complaint that Amanda acted with the apparent authority of Titan and because she induced William to believe that he had the insurance coverage that he had before the May 4, 1999 lapse, that Titan should be estopped from denying the insurance coverage at issue. A principal is liable for the acts of its agent done within the scope of the agent's authority. *Allstate Ins Co v Snarski,* 174 Mich App 148; 435 NW2d 408 (1988).[4]

The trial court correctly observed that estoppel may operate to hold an insurer liable for coverage that differs from the express term of the contract. *Mate v Wolverine Mut Ins Co,* 233 Mich App 14, 22; 592 NW2d 379 (1998). Further, equitable estoppel arises when a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe certain facts and the second party rightfully relies and acts on this belief such that he will be prejudiced if the first party is permitted to deny the existence of such facts. *Id*. The court concluded that, given the facts, plaintiffs' reliance was not justified.

The court noted that plaintiffs failed to renew their policy within the thirty-day period, thus requiring a new application for insurance to provide coverage. Further, although plaintiffs claimed that they tendered $414 to renew and reinstate the policy, no cancelled check existed, no new policy with a new policy number was issued, and no bills were received after the alleged tendering of this check. Thus, the court concluded that the actions of Titan could not have induced plaintiffs to believe that they were insured given the total lack of confirmation.

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[3] According to Amanda's deposition, the Allstate office may or may not have a record of a payment taken for forwarding to Titan Insurance, depending on the circumstances.

[4] It is unclear from the trial court's opinion whether the court implicitly found that the Kitchens were agents of Titan Insurance or that Steve was not an independent agent. Ordinarily, an independent insurance agent is an agent of the insured, not the insurer. *Harwood v Auto-Owners Ins Co,* 211 Mich App 249, 254; 535 NW2d 207 (1995).

While we agree with the general rules cited by the trial court, we again conclude that the court's view of the evidence and the grant of summary disposition were improper. The standard for summary disposition requires that a court view the evidence in the light most favorable to the nonmoving party. *Smith*, supra at 454. In this case, viewing the evidence in the light most favorable to plaintiffs, we conclude that the evidence created a genuine issue of material fact whether plaintiffs rightfully relied on the representation that their insurance policy would be reinstated upon payment of the $414 check that William testified he gave to Amanda.

According to William's deposition, Amanda informed him that a representative at Titan told her that the policy would be reinstated upon payment of the $414, and he gave the $414 check to Amanda at her direction to forward to Titan. This evidence is sufficient to create an issue of fact regarding whether plaintiffs' reliance was justified, and therefore summary disposition on this ground was improper. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 303-304; 582 NW2d 776 (1998).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten F. Kelly